United Nations

A/CN.4/620/Add.1

General Assembly

Distr.: General
26 January 2010

Original: English

International Law Commission
Sixty-second session
Geneva, 3 May-4 June and 5 July-6 August 2010

Report of the International Law Commission on the work of its sixty-first session (2009)

Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-fourth session, prepared by the Secretariat

Addendum

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A. Responsibility of international organizations

1. General comments

1. Delegations welcomed the adoption by the Commission of the draft articles on responsibility of international organizations and their commentaries on first reading and emphasized the importance and complexity of that text, particularly in view of the scarcity of practice and the development of new and diverse organizations. The importance of the adoption of a set of rules on the topic as an element of the rule of law at the international level was emphasized, and the method applied by the Commission, taking into account comments made on earlier versions of the draft, was welcomed. While support was expressed for most of the modifications thus brought to the text, some delegations noted the need for further elaboration of the commentaries.

2. Several delegations welcomed the general structure of the draft articles, although the difficulty of encapsulating all rules of responsibility of various international organizations in a single text was emphasized. In that regard, concern was expressed about the abstract character of some provisions, which did not sufficiently take into account the different powers and effects of decisions of organs of international organizations, and the influence of some members on them. It was noted that the Commission should refrain from attempting to reflect in the text various possible anticipated scenarios. It was further noted that the draft articles would prove less useful if unsupported by practice, as was the case for some provisions on aid, assistance and control or on circumstances precluding wrongfulness. The need to consider also the practice of organizations other than the United Nations and the European Union was mentioned in that respect.

3. The nature and extent of the relationship between the articles on State responsibility and the draft articles on responsibility of international organizations also attracted comments. For some delegations, the current draft articles managed to achieve a fair balance between the inspiration provided by the articles on State responsibility and the recognition of the specificities of international organizations. Other delegations, however, called for a more cautious approach and further study of the differences between States and international organizations. For some delegations, the parallels drawn between the articles on State responsibility and the draft articles on responsibility of international organizations had resulted in a degree of impracticability and the analogy between the two should not be extended beyond well-established rules; it would be better for the Commission to focus on specific issues arising from the responsibility of international organizations.

2. Comments on specific aspects of the draft articles

Part One — Introduction

4. While the new placement of the definitions in the text was welcomed, some suggestions were made as to the use of terms described in draft article 2. It was indicated that the definition of international organizations should be limited to intergovernmental organizations. The definition of the rules of the organizations met with support, although it was also deemed too broad and unclear, in particular with respect to the meaning of the reference to established practice amounting to a rule of the organization. Support was expressed, however, for the choice made by the Commission in not determining which of the rules of the organization constituted

international obligations. As far as the use of the term "agent" was concerned, it was suggested that the definition be based on the understanding of the term as rendered by the International Court of Justice.

Part Two, Chapter II — Attribution of conduct to an international organization

5. The view was expressed that some of the relevant draft articles required further consideration, particularly in respect of conduct of organs or agents placed at the disposal of an organization by a State or another organization. Reference was made to the relevance of the decision of the European Court of Human Rights in the *Behrami* and *Saramati* cases and of other decisions taken by the same tribunal and by domestic courts. In the light of that case law, the use by the Commission of the criterion of effective control or its reference to the performance of the functions of the agent were questioned, and the importance of the specificities of the chain of command and control on personnel put at the disposal of the United Nations in the context of peacekeeping operations was emphasized. Some delegations, however, expressly supported the stance adopted by the Commission.

Part Two, Chapter IV — Responsibility of an international organization in connection with the act of a State or another international organization

6. Various views were expressed regarding the responsibility incurred by international organizations as a result of decisions, authorizations and recommendations they address to their members. While some delegations called for the further elaboration of the notion of circumvention and clarification of the nature of the link between the authorization or recommendation of the organization and the act of its members, concern was expressed as to the suggestion that recommendations by an international organization may entail its responsibility. It was also indicated that States should be vigilant in not allowing an organization to be used for a national rather than a genuine collective interest.

Part Two, Chapter V — Circumstances precluding wrongfulness

7. For some delegations, the transposition to international organizations of circumstances precluding wrongfulness applying to States should be revisited, particularly the provisions concerning self-defence, distress or necessity.

8. Doubts were expressed in particular with regard to the reference to self-defence, which related primarily to States and could result in a conflict with the Charter of the United Nations. It was noted, however, that instances of self-defence could occur when an organization administered a State territory, and the wording of the corresponding provision, which did not rely on an analogy with the right of self-defence pertaining to States, also gained some support.

9. While some delegations continued to express concern regarding the introduction of the concept of countermeasures in the regime of responsibility of international organizations, the careful wording used by the Commission in draft article 21 was welcomed.

Part Three, Chapter II — Reparation for injury

10. From a general standpoint, it was indicated that the linking of the responsibility of international organizations and State responsibility with respect to

reparation for the commission of wrongful acts deserved deeper examination. Greater clarity was called for regarding the role of the organization and its members in the performance of the obligation of reparation of the organization. While some delegations considered that the Commission had struck a fair balance in that regard, as there was no legal ground for establishing the joint liability of members of an international organization when the organization failed to achieve full reparation others supported either an explicit rejection of the existence of a subsidiary obligation belonging to member States in such an occurrence or an indication of the limited role to be played by member States in that regard. It was also emphasized that the obligation to have members give the organization the means for providing reparation belonged to the organization concerned, and that the specific role of members in the decision-making process of the organization should also be considered in respect of reparation for injury.

Part Four, Chapter I — Invocation of the responsibility of an international organization

11. While it was suggested that the Commission study the possibility that the responsibility of an organization be invoked before international tribunals, it was also indicated that remedies provided by the responsible organization should include arbitral and national tribunals and administrative bodies. More broadly, it was emphasized that further elaboration of the invocation of the responsibility of an international organization and of the entitlement of members of the organization in that respect ought to be considered.

Part Four, Chapter II — Countermeasures

12. While some delegations welcomed the inclusion of provisions on countermeasures, the need for a detailed elaboration in that respect was also questioned. It was suggested that the Commission take a cautious approach and further study, in its second reading, the case of organizations deprived of dispute resolution mechanisms or failing to provide, in their constituent instruments, for the possibility for their members to take countermeasures against them. It was also emphasized in that regard that countermeasures should be distinguished from other measures, such as sanctions by the Security Council.

Part Five — Responsibility of a State in connection with the act of an international organization

13. Some delegations indicated that the provisions dealing with the responsibility of a State for the act of an organization lacked clarity, especially concerning the aid, assistance or control provided to the organization. A concern was expressed over situations in which member States were merely implementing a binding rule of an international organization, and the willingness of the Special Rapporteur to re-examine certain issues of attribution in the light of new jurisprudence and comments received was welcomed. Other delegations, while rejecting the responsibility of a State based on its mere membership of an organization, welcomed those provisions. It was also suggested that a distinction be drawn between cases in which an organization authorized its members to adopt a conduct and cases in which it orders them to do so.

14. While they generally welcomed the principle underlying the article dealing with the responsibility of a State seeking to avoid compliance with one of its obligations by taking advantage of the competence entrusted to an organization of which it is a member, some delegations questioned the breadth of that provision and sought further clarification of the causal link between the conduct of the State and that of the organization. While it was indicated that a general, if not a specific, level of intent, based on a factual and legal assessment, should be required in that regard, the view was also expressed that it would be difficult to provide evidence of specific intent on the part of a member to circumvent its obligations by using the competence of the organization.

Part Six — General provisions

15. Several delegations welcomed the inclusion of general provisions in the draft articles. The addition of a reference to the need to take account of the special characteristics of an international organization, which had been put forward during the debate in the Commission, received some support, although it was also pointed out that it could have the effect of putting the application of the draft articles in jeopardy.

16. Various views were expressed regarding the application of special rules (*lex specialis*). While several delegations supported the inclusion of a provision on the priority to be given to special rules, such as the rules of the organization, over general rules, others indicated that further consideration should be given to the issue so as to appreciate its actual scope. Some delegations indicated that the rules of an international organization should govern the relations between that organization and its members or, at least, play a key role in that regard. Others, however, warned against the risk that those internal rules might be used as a justification for breaches of international legal obligations and, more generally, that the reference to the *lex specialis* might be used to apply double standards to different organizations. The view was also expressed that the *lex specialis* should be limited to the internal law of the international organization concerned.

17. Regarding the "without prejudice" clause on individual responsibility, the view was expressed that a reference should be made to the civil and criminal responsibility of any person acting on behalf of an organization.

18. The need to include a provision such as draft article 66, according to which the draft articles are without prejudice to the Charter of the United Nations, was questioned by some delegations, especially given the fact that international organizations could not become parties to the Charter.

3. Issues concerning international responsibility between States and international organizations

19. Regarding the question as to when conduct of an organ of an organization placed at the disposal of a State would be attributable to the latter, several delegations noted the rarity of such an occurrence and emphasized the principle of attribution to the State by analogy with the articles on State responsibility. Others put forward various criteria for attribution to the State — notably, the criterion of effective control and the exercise of elements of governmental authority — while the need to respect the separate legal personalities of the organization and its members was emphasized, although it could prove necessary to pierce the veil of the

organization in specific cases of *ultra vires* conduct or conduct contravening a peremptory norm of international law. The view was expressed that the case of an organ of an organization acting under the direction and control of a State should also be considered.

20. Regarding the question as to when consent given by an organization would preclude the wrongfulness of an act committed by a State, while some delegations indicated that an application by analogy of the articles on State responsibility would be sufficient, others emphasized the complexity of the matter in all its ramifications (identity of the organ giving consent, origin and effect of the consent, etc.). It was indicated that a distinction should be drawn between rules protecting only the rights of the organization and those protecting the rights of other persons. In that context, some delegations also emphasized the relevance of the principle of *volenti non fit injuria* and of the general principle of *nemo plus juris ad alium transferre potest quam ipse habet*. The determinative role of the status of the State vis-à-vis the organization, and of the nature and competence of the latter, were also mentioned as relevant factors in that regard.

21. Regarding the circumstances under which an international organization may be entitled to invoke the responsibility of a State, several options were put forward. While some delegations indicated that mere regulation by analogy with the articles on State responsibility was sufficient, others expressed a preference for a specific treatment in the context of the draft articles on responsibility of international organizations. For several delegations, further study of the residual questions covered neither in the articles on State responsibility nor in the draft articles on responsibility of international organizations was necessary, leading to the separate adoption of a distinct article on the issue by the Commission, which would ultimately be endorsed by the General Assembly. While some delegations emphasized the determinative role of the status of the State vis-à-vis the organization, and of the nature and competence of the latter, others encouraged the Commission to further differentiate among various cases on the basis of the nature of the obligations concerned, whether they are owed to the organization itself or only to some of its members, or have an *erga omnes* character. It was also indicated in that context that an annex to the draft articles could address the potential concurrence between the exercise of diplomatic protection by a State and that of functional protection by an international organization.